Supreme Court, U.S.
FILED

95 • 883 DEC 5 1995

OFFICE OF THE CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE WEST OF ENGLAND SHIP OWNERS
MUTUAL PROTECTION AND INDEMNITY ASSOCIATION
(Luxembourg),
Petitioner,

v.

STEPHEN A. MOREWITZ,
as administrator, etc.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JOSEPH M. ALLEN, JR.
JOHNSTONE, ADAMS, BAILEY,
GORDON & HARRIS, L.L.C.
Post Office Box 1988
Mobile, Alabama 36633
(334) 432-7682
Counsel of Record for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. The Respondent sued in district court on a marine insurance policy seeking to collect proceeds allegedly due under the policy. Petitioner obtained an order under § 3 of the Federal Arbitration Act (9 U.S.C. §§ 1-16 (1970 & Supp. 1995)) staying the litigation pending arbitration as required by the contract sued on. Respondent refused to arbitrate and, as a result, his suit was dismissed. Respondent then appealed the dismissal. The Eleventh Circuit held that it had jurisdiction not only over the dismissal but also, contrary to holdings in the Fourth, Seventh and Tenth Circuits, the order entered under § 3 of the Act. The question thus presented is whether the Respondent, under § 16(b)(1) of the Act, was required to arbitrate his claim before obtaining appellate review of the stay order.

2. Whether Petitioner's failure to demand arbitration six years prior to the institution of this suit against it constitutes a waiver of its contractually guaranteed right to compel arbitration of a dispute arising under a maritime contract cognizable in admiralty.

3. Whether a federal district court exercising admiralty jurisdiction must apply the direct action statute of the state in which the court is situated (here, Alabama) as the procedure of the forum, rather than conducting a choice of law analysis pursuant to federal admiralty choice of law rules.

PARTIES

PETITIONERS:

The West of England Ship Owners Mutual Insurance Association (Luxembourg)

The West of England Ship Owners Insurance Services Limited

RESPONDENTS:

Mukhtar Ahmed
Gulzar Ahmed
Khatoon Ahmed
Zulfegar Ahmed
Iftikhar Ahmed
Ijoz Ahmed
George Marangos
Andreas Marangos
Akaterini Marangos
Georgia Marangos
Efran Alvardo Martinez
Efran Martinez
Priscilla Martinez
Denora Martinez
Jose Martinez
Danello Martinez
Jesus Ramos Mayorquin
Guillermina Mayorquin
Maria Mayorquin
Daniel Mayorquin
Jose Mayorquin
Stephen J. Morewitz
Christos Passalis
Zorka Passalis
Heleni Passalis
Panagiotis Passalis
Eleni Passalis
Constantinos Stamatis
Afrodite Stamatis
Athena Stamatis

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
STATEMENT OF BASIS FOR JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
Overview	1
Virginia Litigation	2
Alabama Litigation	3
REASONS FOR GRANTING THE WRIT	5
I. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A PARTY WHOSE ACTION IS STAYED UNDER SECTION 3 OF THE ARBITRATION ACT MUST ARBITRATE ITS CLAIM BEFORE OBTAINING APPELLATE REVIEW OF THE ARBITRATION ORDER	5
A. The Question	6
B. The Eleventh Circuit Decision	10
C. The Conflict	11
II. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A PARTY MAY WAIVE ITS CONTRACTUAL RIGHT TO COMPEL ARBITRATION BY FAILING TO MAKE A PRE-LITIGATION DEMAND TO ARBITRATE	17

TABLE OF CONTENTS—Continued

	Page
A. The Question	17
B. The Eleventh Circuit Decision	18
C. The Conflict	20
III. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A FEDERAL DISTRICT COURT EXERCISING ADMIRALTY JURISDICTION MUST APPLY DIRECT ACTION STATUTES OF THE SATE IN WHICH THE COURT IS SITUATED WITHOUT REGARD TO FEDERAL ADMIRALTY CHOICE OF LAW RULES	24
A. The Question	24
B. The Eleventh Circuit Decision	25
C. The Conflict	26
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

CASES

	Page
Adair Bus Sales, Inc. v. Bluebird Corporation, 25 F.3d 953 (10th Cir. 1994)	11, 12
Allied-Bruce Terminix Companies v. Dobson, 115 S.Ct. 834 (1995)	5, 7, 8, 23
American Casualty Co. v. L-J, Inc., 35 F.3d 133 (4th Cir. 1994)	15, 16
Collins v. American Automobile Ins. Co., 230 F.2d 416 (2nd Cir. 1956)	29
Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985)	7, 17
Erie Railroad v. Tompkins, 304 U.S. 64 (1938)	25, 28
Fleming v. Pan American Fire & Casualty, 495 F.2d 535 (5th Cir. 1974)	24, 26, 27
General Guaranty Ins. Co. v. New Orleans Gen. Agency, Inc., 427 F.2d 924 (5th Cir. 1970)	21, 22
Humphrey v. Prudential Sec. Inc., 4 F.3d 313 (4th Cir. 1993)	15, 16
Klaxon Co. v. Stentor Electric Mfg., 313 U.S. 487 (1941)	27, 28
Lauritzen v. Larsen, 345 U.S. 571 (1953)	25
Lubrizol Int'l v. M/V STOLT ARGOBAY, 562 F. Supp. 565 (S.D.N.Y. 1982)	21, 23
Macey v. Crum, 30 So. 2d 666 (Ala. 1947)	26
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)	9
Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1 (1983)	17
National Foundation for Cancer Research v. A. G. Edwards & Sons, 821 F.2d 772 (D.C. Cir. 1987)	18
Perera v. Siegel Trading Co., 951 F.2d 780 (7th Cir. 1992)	12, 13
Rush v. Oppenheimer & Co., 779 F.2d 885 (2nd Cir. 1985)	17
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)	5, 6, 8, 20
Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil, 767 F.2d 1140 (5th Cir. 1985)	19
Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977)	17

TABLE OF AUTHORITIES—Continued

Page

Southside Internist Group v. Janus Capital Corp., 741 F. Supp. 1536 (N.D. Ala. 1990) 23
State Establishment for Agric. Prod. Trading v. M/V WESTERMUNDE, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988) 8, 10, 11, 12, 13
State Trading Corp. v. Assuranceforeningen Skuld, 921 F.2d 409 (2d Cir. 1990) 24, 25, 28, 29
Stedor v. Armtex, Inc., 947 F.2d 727 (4th Cir. 1991) 13, 14, 15, 16
Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485 (11th Cir. 1986) 28
Stifel, Nicholaus & Co., Inc. v. Freeman, 924 F.2d 157 (8th Cir. 1991) 22
Tenneco Resins, Inc. v. Davy Int'l AG, 770 F.2d 416 (5th Cir. 1985) 22
The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 20
Ultracashmere House, Ltd v. Meyer, 664 F.2d 1176 (11th Cir. 1981) 7
Vimar Seguros y Reaseguros v. Sky Reefer, 115 S.Ct. 2322 (1995) 9, 10, 20, 23
Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. (1989)..5, 7, 19
Wilburn Boat Co. v. Fireman's Fund, 348 U.S. 310 (1955) 26, 28

OTHER

H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924)..... 5, 7

OPINIONS BELOW

The opinions of the Eleventh Circuit (App., *infra*, 1a-21a, 35a-46a) are reported at 62 F.3d 1356 and 896 F.2d 495. An opinion of the Eleventh Circuit and all opinions of the district court are unreported, but are set out in appendices B, C, D, E, and G.

STATEMENT OF BASIS FOR JURISDICTION

Petitioner seeks review of the order entered by the Eleventh Circuit Court of Appeals on September 6, 1995 in *Morewitz v. The West of England*. The jurisdiction of this Court to review that order on a writ of certiorari is conferred by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Sections 1-4 and 16 of the Federal Arbitration Act, sections 27-23-1 and 27-23-2 of the Code of Alabama (1975) and The British Third Parties (Rights Against Insurers) Act of 1930 are reproduced at App., *infra*, 80a-89a.

STATEMENT OF THE CASE

Overview

The Respondent in this action is the administrator of the estates of eleven foreign seamen who died when the IMBROS, a Cypriot flagged cargo vessel, sank in international waters on December 14, 1975. His predecessor administrator filed a wrongful death suit on behalf of their estates in the Eastern District of Virginia in 1976. Respondent obtained what was, essentially, a default judgment against General Development & Shipping Enterprises Co., Ltd. ("General Development"), the vessel's managing agent, on April 3, 1980 on behalf of seven of these estates. The judgment against it was not paid. No judgment was obtained against the ship's owner, Imbros Shipping Co., Ltd., or against Petitioner. Imbros Shipping was dismissed. Petitioner was never sued.

No action to collect the judgment against General Development was taken until 1985 when Respondent brought suit in the Southern District of Alabama against Petitioner,

The West of England Ship Owners Mutual Protection & Indemnity Association (Luxembourg) ("West of England") a Luxembourg corporation, seeking to collect that Virginia judgment. Alabama was selected because of the presumed reach of the Alabama "long-arm" statute. (App. G, 55a n.2). The theory of Respondent's Alabama suit was that the West of England had insured General Development as owner *pro hac vice* of the IMBROS under a protection and indemnity policy issued through Petitioner's agent in London, even though General Development was never a named assured. Significantly, this policy provided not only for the payment of funds to the only named insured, Imbros Shipping, under certain circumstances but also that (i) all disputes thereunder were to be resolved by arbitration in London and (ii) English law would apply to all such disputes.

The issue underlying this petition arises from the fact that the Respondent embraces the indemnity contract insofar as he might be entitled to money thereunder but disavows those portions of it which require arbitration in London and application of the laws of England. His contention, adopted by the Eleventh Circuit, is that the arbitration clause should not be placed on "the same footing" as the other provisions of the contract.

Virginia Litigation

Following the sinking of the IMBROS, Ruth Morewitz, then an attorney in Newport News, Virginia, obtained appointment as administrator of the estates of eleven deceased crew members of the IMBROS. She thereafter filed a maritime wrongful death action in the Eastern District of Virginia against numerous parties including Imbros Shipping Co., Ltd., the vessel's owner, and General Development, its managing agent. Imbros Shipping Co., Ltd., the owner, was dismissed for lack of personal jurisdiction. General Development, however, which acted as "agent for twenty or more vessels, many of which called in the Hampton Roads port on a regular basis," remained as a defendant. (App. I, 59a).

During the course of the litigation, General Development failed to respond to discovery. The court, on March 26, 1979, entered an Order which, after reciting General Development's defaults with respect to discovery, ruled that "[u]nder authority of Rule 37(d) . . . [f]or purposes of the trial in this matter General Development & Shipping Enterprises Co., Ltd. shall be considered as owner *pro hac vice* at the time of the loss." (App. J, 2). A Memorandum Opinion issued April 3, 1980 found liability on the part of General Development as owner *pro hac vice* of the IMBROS. (App. I, 59a). Damages were awarded on behalf of seven deceased crew members.

It is these Virginia awards, arising from a casualty in international waters which Respondent seeks to collect in Alabama from a Luxembourg corporation which was never a defendant in the Virginia suit. This suit is predicated on a protection and indemnity contract Petitioner issued in 1975 to Imbros Shipping, a Cypriot corporation over which personal jurisdiction was never obtained in Virginia and against which no judgment has ever been rendered.

Alabama Litigation

The Respondent's original complaint in the Southern District of Alabama against Petitioner was filed June 26, 1985, more than five years after judgment was entered against General Development. The only basis alleged for the suit was a British direct action statute known as The Third Parties (Rights Against Insurers) Act, 1930. The Respondent thereafter filed an amended complaint alleging that the action was based upon a policy or contract of marine insurance. Respondent also invoked the Alabama direct action statute. (App. M). Although referred to (incorrectly) as a "direct action statute," the Alabama statute is actually a statute providing for an action in aid of execution.

The district court dismissed for lack of subject matter jurisdiction. (App. G). The Eleventh Circuit reversed, holding that the allegation in the complaint that recovery

was sought on a marine policy was "enough to confer subject matter jurisdiction." (App. F, 41a).

After remand to the district court Petitioner filed a motion under § 3 of the Federal Arbitration Act (9 U.S.C. §§ 1-16 (1970 & Supp. 1955)) ("the Act") to stay the litigation pending arbitration in London as required by the contract. The court entered a stay order pursuant to § 3 of the Act on April 13, 1992 which the Respondent attempted to appeal. (App. E). The Eleventh Circuit dismissed the appeal because it had no jurisdiction to review the stay order under § 16(b)(1) of the Act which mandates that no appeal may be taken from an order staying litigation pursuant to § 3 of the Act. (App. D).

The district court then entered an order granting the Respondent 180 days in which to commence arbitration. (App. C). He refused do so. Petitioner thus moved for, and was granted, a dismissal because of the Respondent's failure to commence arbitration. (App. B). The Respondent appealed that order of dismissal and it was that appeal which resulted in the Eleventh Circuit decision of September 6, 1995 of which review is here sought. (App. A).

Petitioner contested the court's appellate jurisdiction arguing that, under § 16(b)(1), there can be no judicial review of a stay order under § 3 until after the arbitration has gone forward to a final award. (This is the first question presented for review here.) Petitioner also argued that, regardless of the Respondent's contentions to the contrary, the Petitioner had not waived its right to arbitrate by not making a pre-litigation demand for arbitration. (This is the second question presented for review.)

The Eleventh Circuit held that simply because the lower court entered an order of dismissal, it had the power to review (and reverse) not only that order, but also the stay order under § 3 without the parties engaging in arbitration notwithstanding § 3, § 16(b)(1), holdings of other circuits and the conclusions of commentators. And

in so doing it relied solely on a case decided over eight months before § 16 of the Arbitration Act became law. This creates a significant conflict among the circuit courts of appeal by allowing appeal of orders favoring arbitration under § 3. The Eleventh Circuit's ruling does not place arbitration agreements on "the same footing" with other agreements. Rather, by allowing an immediate appeal of rulings favoring arbitration, and by ruling that the right to arbitrate may be waived six years before a dispute with the plaintiff has arisen, the Eleventh Circuit relegates agreements to arbitrate to the lowest status in the hierarchy of contractual undertakings.

REASONS FOR GRANTING THE WRIT

I. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A PARTY WHOSE ACTION IS STAYED UNDER SECTION 3 OF THE ARBITRATION ACT MUST ARBITRATE ITS CLAIM BEFORE OBTAINING APPELLATE REVIEW OF THE ARBITRATION ORDER.

There has long been, as this Court recognized most recently in *Allied-Bruce Terminix Companies v. Dobson*, a "judicial hostility to arbitration agreements" in "both federal and state courts." 115 S. Ct. 834, 839 (1995). For that reason, in 1925, Congress enacted the Federal Arbitration Act "to overcome courts' refusals to enforce agreements to arbitrate." *Id.* at 838. By the Act, Congress accomplished this by putting arbitration agreements on "the same footing" as other contractual undertakings. *Id.* (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, in turn quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924))). The Eleventh Circuit order of which review is sought is but a lingering manifestation of such judicial hostility.

The Respondent obtained a judgment in 1980 in the Virginia action against an entity *alleged* to have been the insured owner of the IMBROS when it sank. The

protection and indemnity policy underwritten by the Petitioner, a Luxembourg company, and issued through its agents in London, contained a clause requiring arbitration of all disputes arising under the policy. (App. O). The appellate court's refusal to affirm the order staying the litigation pending arbitration pursuant to § 3 of the Act is but another "parochial refusal by the courts of one country to enforce an international arbitration agreement." *Scherk*, 417 U.S. at 516. And, as recognized in *Scherk*, such refusals will (and in this case have) invited "unseemly and mutually destructive jockeying" by litigants "to secure tactical litigation advantages," as evidenced by the Respondent's selection of a forum solely because it gives him a jurisdictional reach supposedly not available in other states. *Id.* at 517. (*See* App. G, 55a n.2, noting that the Respondent "readily admits that the reason the action was filed in [Alabama] is that . . . Alabama's long-arm statute is much broader than that of Virginia.").

The Eleventh Circuit has thus thrust Petitioner into an undefined Alabama statutory scheme, a veritable "legal no man's land," for the benefit of foreign citizens who have no claim whatsoever on the judicial resources of the United States. *Scherk*, 417 U.S. at 517. Not only is this decision in conflict with decisions of other courts of appeal, it is a decision which, independent of this conflict, has created an uncertainty with respect to a party's rights under the Federal Arbitration Act. This uncertainty should be resolved by this Court.

A. The Question

This conflict and uncertainty result from the Eleventh Circuit's unsettling misconception of the Act's purpose. The Eleventh Circuit, in direct conflict with the decisions of this Court, states,

> The purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation.

(App. A, 15a) (quoting *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981)).

But the Act was not passed to "relieve congestion" or to "provide parties with an alternative" mechanism for resolving disputes. On the contrary, "its passage 'was motivated, first and foremost, by a Congressional desire to enforce arbitration agreements into which parties had entered.'" *Volt Info. Sciences*, 489 U.S. at 478 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985)). By enacting this legislation, Congress intended "to place such agreements 'upon the same footing as other contracts.'" *Volt Info. Sciences*, 489 U.S. at 478 (quoting *Scherk*, 417 U.S. at 511, in turn quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). *See also*, *Allied-Bruce Terminix Companies*, 115 S.Ct. at 838 ("the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."); and *Dean Witter Reynolds*, 470 U.S. at 219 ("We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."). It is thus no wonder that, rather than putting agreements to arbitrate on "the same footing" as other provisions in a contract, the Eleventh Circuit decision relegates them to a lower status by permitting a court to arrogate to itself the power to enforce certain provisions of a contract (such as those requiring the payment of money) while refusing to enforce agreements to arbitrate, and by finding a waiver of the right to arbitration based on the absence of a pre-litigation arbitration demand. This aberrant decision results from a fundamental misunderstanding of the very purpose of the Act.

The Act, as noted, was designed to overcome judicial hostility to arbitration, a matter of extreme importance in international transactions.

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the

> law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Scherk, 417 U.S. at 516.

The Act, therefore, must be construed broadly in favor of arbitration. *See, e.g., Allied-Bruce Terminix Companies*, 115 S.Ct. 834 (1995).

In 1988, Congress broadened even further the reach of the Act by prohibiting appeals of rulings under §§ 3 and 4 favoring arbitration over litigation. These prohibitions are found in § 16, a section which was part of the 1988 Judicial Improvements and Access to Justice Act, which became law on November 19, 1988. (This date is crucial to an analysis of the Eleventh Circuit decision since, in determining appellate jurisdiction, it relied on *State Establishment for Agric. Prod. Trading v. M/V WESERMUNDE*, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988), decided eight months prior to the effective date of the Act of which § 16 was a part.) No decision of this Court through this date has construed any portion of section 16, although mention is made of it in two cases.

The Congressional intent to promote enforcement of arbitration agreements is further demonstrated by the fact that the Act is incorporated into a treaty to which the United States and essentially all of the world's economic powers are parties. Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* 9 U.S.C. § 208.

Section 16 establishes a comprehensive set of rules which govern when orders entered under §§ 3 or 4 may be appealed and when they may not. In analyzing § 16, however, we must focus first on orders to stay litigation issued under § 3 because a close reading of the language of § 3 is necessary to understand § 16. In § 3, Congress dictated that if a suit was brought on "any issue referable to arbitration under an agreement in writing," the court

shall, on motion, "stay the trial of the action *until such arbitration has been had.*" 9 U.S.C. § 3 (emphasis added). Thus § 16 allows an appeal of an order *refusing* a stay (§ 16(a)(1)(A)), but, § 16(b)(1) prohibits an appeal "from an interlocutory order *granting* a stay of any action under § 3 of this title." (Emphasis added).

Section 16(b)(1) lies at the heart of this petition. Specifically, Petitioner requests this Court to determine a question which it has never before been called upon to decide: Whether, under § 16(b)(1), a party whose action is stayed pending arbitration under § 3 must first arbitrate his dispute with the opposing party before obtaining appellate review of that order. (Such review, incidentally, is provided for in the Act after arbitration. 9 U.S.C. §§ 9, 10 and 11. *See also, Vimar Seguros y Reaseguros,* 115 S.Ct. 2322, 2329 (1995); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 638 (1985)).

The rule recognized by the other circuits which have considered the issue is that appellate review of an order favoring arbitration cannot be had "until such arbitration has been had." 9 U.S.C. § 3. David D. Siegel, author of the "Practice Commentary" printed at 9 U.S.C.A. 219, states that,

> [t]he mission of § 16 is to assure that if a district court does determine that arbitration is called for, the court system's interference with the arbitral process will terminate then and there, leaving the arbitration free to go forward.

In other words, in the language of § 3, litigation must cease "until such arbitration has been had." [This Practice Commentary is quoted with approval in decisions discussed below.] The Eleventh Circuit, however, ruled that a plaintiff, by ignoring the § 3 order, thus inviting dismissal of his case, can get to the appellate court by virtue of the dismissal and, while there, have the propriety of the stay order judicially reviewed.

Thus, whether the court's involvement with a dispute should terminate when an order is entered under § 3 staying further litigation "until . . . arbitration has been had . . . leaving the arbitration free to go forward" (Siegel at 219), or whether the § 3 order can be appealed *before* "such arbitration has ben had," is the issue we ask this Court to review.

B. The Eleventh Circuit Decision

The crux of the conflict is the Eleventh Circuit's determination that Respondent was *not* required to wait "until such arbitration had been had" before obtaining appellate review of the district court order requiring arbitration. Notwithstanding that the language and policies underlying the Act required Respondent to arbitrate before seeking appellate review of the stay order, the Eleventh Circuit held that arbitration was unnecessary. In so doing, it relied on *State Establishment,* 838 F.2d 1576, a case decided on March 11, 1988, to construe an Act of Congress which did not become law until November 19, 1988, over eight months later. "[W]e are guided by our decision in a case [*State Establishment*] that was presented in the same procedural posture as the one at hand." (App. A, 8a). Not only was the jurisdictional aspect of *State Establishment* rendered null by statute almost as soon as it was announced, the Eleventh Circuit's hostility toward foreign arbitration expressed in that same case was rejected by this Court in *Vimar Seguros y Reaseguros,* 115 S.Ct. 2322 (1995). Clearly the Eleventh Circuit's misconception of the purposes of the Act and its reliance on *State Establishment* strip its decision of any presumption of correctness to which it might otherwise have been entitled.

Not only did the decision begin with a misunderstanding of the Act and reliance on a dated case, the Eleventh Circuit's decision eschewed any discussion of the prohibitions of appellate review contained in § 16 (b)(1). Its only mention of that section was made

in a passing note of the Respondent's position. (App. A, 8a). No mention is made of the different judicial treatment accorded arbitrability issues in other circuits, notwithstanding that these questions were briefed for the court. Rather, the Eleventh Circuit concluded that because the district court's dismissal order, entered because of the Respondent's refusal to arbitrate, was itself a "final" judgment, it automatically had jurisdiction to review the prior order. The Eleventh Circuit recounted that in *State Establishment*, it was aware that a litigant ignoring a stay order under § 3 of the Act was taking a risk because "if the district court was correct in ordering arbitration, the dismissal with prejudice for failure to comply with that order would be affirmed by this court." (App. A, 9a (quoting *State Establishment*, 838 F.2d at 1579)). The Eleventh Circuit then closed the book on the jurisdictional issue by stating that "[f]ortunately for Morewitz . . . we disagree with the district court's order requiring the parties to arbitrate this dispute." (App. A, 9a). It never occurred to the Court that there was any issue before it other than whether it disagreed with the district court's order staying litigation.

C. The Conflict

It is therefore not surprising that the Eleventh Circuit's holding is contrary to the decisions of the Tenth, Seventh, and Fourth Circuits. The Tenth Circuit in *Adair Bus Sales, Inc. v. Bluebird Corp.*, 25 F.3d 953 (10th Cir. 1994) was presented with an issue very similar to this one but resolved it in an altogether different way. A plaintiff sued for breach of contract. The defendant moved to stay the suit pending arbitration under § 3 of the Act. Instead of staying the action, however, the district court dismissed it and ordered the parties to proceed to arbitration. Without engaging in arbitration, the plaintiff appealed immediately claiming (as did Respondent below) that the defendant "was estopped from asserting a claim for arbitration." *Adair*, 25 F.3d at 955. The defendant challenged the jurisdiction of the

appellate court on the strength of the strict prohibition against appeal in § 16(b)(1) of the Act. If the Tenth Circuit had used the Eleventh Circuit's logic, it would have concluded that simply because it had jurisdiction as a result of the dismissal order, it *automatically* had appellate jurisdiction over the stay order. But the Tenth Circuit rejected such logic. It held that because "the appeal is presented to us upon the district court's order of dismissal we have appellate jurisdiction . . . and may correct the procedural error," (*id.*) but, consistent with the purposes of the Act, it refused to consider the order under § 3 mandating arbitration because such an order was not reviewable on appeal until after arbitration had been concluded. This is obviously in conflict with the Eleventh Circuit's holding.

The practical result of this conflict is that a plaintiff in the Fourth, Seventh and Tenth Circuits, but not the Eleventh and possibly the Sixth cannot ignore an order under § 3 to arbitrate but must engage in arbitration *before* obtaining judicial review of that order. In the Eleventh Circuit, however, a plaintiff may disobey a § 3 order and thereby dodge the Act's prohibition against appeal.

The law in the Seventh Circuit also conflicts with the Eleventh Circuit's law. *Perera v. Siegel Trading Co., Inc.*, 951 F.2d 780 (7th Cir. 1992) contains an analysis of various decisions of other circuits and holds that when a stay order is entered pursuant to § 3, no appellate review of that order may be had until after arbitration is completed. Stated differently, after a stay order is entered, appellate review of the stay order cannot be had regardless of what "final" orders are later entered by the district court.

Thus, in *Perera,* an order to stay pending arbitration was not reviewable on appeal notwithstanding the district court's subsequent entry of a "final judgment" under Rule 54(b). An opposite conclusion, however, was reached in *State Establishment,* the Eleventh Circuit's

guiding light. In *State Establishment*, 838 F.2d at 1583, the Eleventh Circuit stated that when the plaintiff "informed the court [as did Respondent below] that it absolutely refused" to arbitrate its dispute, the district court "should have certified the question under Rule 54(b)," a ploy expressly ruled ineffective by the Seventh Circuit. Specifically the Seventh Circuit stated that "the entry of a Rule 54(b) judgment does not change the interlocutory nature of the district court's order," and cannot therefore confer jurisdiction on an appellate court to review the stay order. *Perera*, 951 F.2d at 786.

But, the Eleventh Circuit's approval of basing appellate jurisdiction over a § 3 order on an after-entered order is obvious. The Court seems to suggest that the district court should have certified the arbitration issue under 28 U.S.C. § 1292(b), as requested by the Respondent, and that it (the Eleventh Circuit) would have accepted the case for review. (App. A, 20a). The Eleventh Circuit is thus saying that it really does not matter how a party subject to a § 3 stay order gets that order to the appellate court, whether under § 1292(b), Rule 54(b) or dismissal for disobedience of court orders, the Eleventh Circuit will review (and reverse) it regardless of § 16. But the rule requiring that parties subject to a stay order arbitrate before appealing cannot be so easily escaped. And other circuits do not allow it.

The Fourth Circuit, in a series of decisions beginning with *Stedor v. Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991), has rejected the Eleventh Circuit's approach. The dispute in *Stedor* arose from a contract which contained an arbitration clause. In seeking to enforce the clause, the plaintiff served notice of its intention to arbitrate. The defendant responded by suing for an injunction against arbitration. In response, the plaintiff sought, and the district court issued, an order compelling arbitration under authority of § 4 of the Act. On appeal, the Fourth Circuit was confronted with the question of whether an order under § 4 compelling arbitration is immediately reviewable in light of § 16 of the Act.

The Court in *Stedor* noted that § 16 establishes a framework in which immediate appeal from orders favoring litigation over arbitration is allowed, § 16(a)(1)(A-C), while § 16 specifically denies the rights to an immediate appeal from interlocutory orders which give arbitration precedence over litigation. 9 U.S.C. § 16(b)(1-4). As support for the proposition that § 16 requires parties to proceed to arbitration before seeking appellate review if the district court order is in favor of arbitration, the Fourth Circuit, quoting David D. Siegel, stated that

> if the district court . . . determine[s] that arbitration is called for, the court system's interference with the arbitral process will terminate then and there, leaving the arbitration free to go forward. To accomplish this, § 16 provides in general that there may be no appeal from the proarbitration determination until after the arbitration has gone forward to a final award.

Stedor, 947 F.2d 730 (quoting Siegel, *Practice Commentary*, 9 U.S.C.A. § 16, at p. 219 (West Supp. 1991)).

Notwithstanding this, however, the court in *Stedor* held that the district court's order directing arbitration to proceed under § 4 was reviewable on appeal because it was a "final" decision given the judicial context in which it was issued. Thus, under authority of 16(a)(3), which permits an appeal from "a final decision with respect to an arbitration," the court addressed the merits of the appeal.

At its core, the holding in *Stedor* turned on a mechanical application of the "embedded" versus "independent" analysis. Specifically, the court held that the parties need not first arbitrate before appealing because the § 4 order "was issued in an independent action in which the only issue before the court was the dispute's arbitrability." *Stedor*, 947 F.2d at 729. The Fourth Circuit reasoned that the order under § 4 disposed of the whole case on the merits, thereby satisfying the requirements of finality

in § 16(a)(3). Thus the § 4 order did not fall within the mandate of § 16(b)(2) which disallows appeals from interlocutory orders directing arbitration to proceed under § 4.

However, as the court in *Stedor* further stated, if the arbitrability question is "embedded" in a broader action in the sense that other relief is sought in addition to arbitration, an order directing the parties to arbitrate is not a final order which invokes appellate review. On the contrary, any such order directing arbitration to proceed, issued within the context of an "embedded" proceeding, is interlocutory and thus appellate review is prohibited by § 16(b). *Id.* at 731.

In a pair of later cases, the Fourth Circuit further developed and applied the "independent" versus "embedded" analysis. In *Humphrey v. Prudential Sec. Inc.*, 4 F.3d 313 (4th Cir. 1993), the Fourth Circuit applied the "independent" versus "embedded" analysis in a manner which dictated that the court had no appellate jurisdiction of an order compelling arbitration and staying the action until arbitration had been performed. *Humphrey* was a suit involving various violations of federal and state law. The defendants filed responsive pleadings in which the issue of arbitration was not addressed. Then, the plaintiff moved for an order compelling arbitration and staying his own action. The district court concluded that all of the claims were arbitrable and granted the motion to compel arbitration. *Humphrey*, 4 F.2d at 314.

As the complaint presented more than the limited issue of arbitrability, the order to compel arbitration in *Humphrey*, as in the instant case, was clearly "embedded." Therefore, the court concluded that the arbitration order was not a final decision subject to appellate review. *Id.* at 318. On the contrary, the order was the type of interlocutory order favoring arbitration the appeal of which was prohibited. *Id.* at 319.

Similarly, in *American Casualty Co. v. L-J, Inc.*, 35 F.3d 133 (4th Cir. 1994), the court dismissed an appeal for want of appellate jurisdiction. In that case, a general

contractor sought to enforce an arbitration clause in a contract against a subcontractor's surety. The general contractor sent a demand for arbitration to both the surety and the subcontractor in which actual and punitive damages were sought. The surety responded by filing suit seeking declaratory judgment and moving to stay arbitration. In response, the general contractor moved to stay litigation and compel arbitration. The district court granted the later motion and the surety appealed.

The question of arbitrability was an "embedded" issue in the surety's action. Accordingly, the Fourth Circuit once again refused to review the merits of an order compelling arbitration and staying the litigation "pending the outcome of the arbitration between the parties." *American Casualty*, 35 F.3d at 133. In allowing the arbitration agreement to be enforced as written, the court in *American Casualty* stated that "§ 16 generally precludes appellate review of orders that favor arbitration over litigation 'until after the arbitration has gone forward to a final award.'" *Id.* at 135 (citing *Stedor*, 947 F.2d at 730 (quoting Siegel, *Practice Commentary*, 9 U.S.C.A. § 16, at 270 (West Supp. 1994)).

As expressly noted in *Humphrey*, and implicitly noted in *American Casualty*, the Federal Arbitration Act provides a mechanism by which a district court's order may be reviewable on appeal "after the arbitration has gone forward to a final award." According to *Humphrey* and *American Casualty*, an order favoring arbitration, issued within the judicial setting of an embedded proceeding, is not a reviewable final judgment until after the arbitration process has resulted in an award and a district court has exercised the power to review arbitration awards as provided for in the Act. *Humphrey*, 4 F.3d at 319; and *American Casualty*, 35 F.3d at 139.

Therefore, the Fourth Circuit decisions are in accord with the general mandate of § 16 in that, except for an order issued in an independent proceeding, an order favoring arbitration over litigation is not immediately appealable. As such, parties are required to arbitrate before

invoking appellate review which in turn results in the situation envisioned by Congress. Namely, the arbitration process is allowed to go forward free of any judicial interference in the form of lengthy premature appeals. The Fourth Circuit's adherence to the "independent" versus "embedded" analysis clearly conflicts with the Eleventh Circuit's holding. Contrary to the situation in the Fourth Circuit, a party in the Eleventh Circuit may obtain appellate review of a stay order, even in the context of an "embedded" proceeding, before the arbitration process has gone forward to a final award.

II. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A PARTY MAY WAIVE ITS CONTRACTUAL RIGHT TO COMPEL ARBITRATION BY FAILING TO MAKE A PRE-LITIGATION DEMAND TO ARBITRATE.

A. The Question

The Eleventh Circuit also held that a party, by failing to make a pre-litigation demand for arbitration, could lose forever its right to arbitration.

The question of waiver of arbitration is not new. Courts considering this issue require that an analysis must begin with the general proposition that, while a party can waive its right to arbitrate by acts inconsistent with such a right, there is an overriding federal policy favoring enforcement of arbitration agreements, and waiver is not to be lightly inferred. *Moses H. Cone Memorial Hosp. v. Mercury Constr.*, 460 U.S. 1, 24 (1983) (the Arbitration Act "is a Congressional declaration of liberal federal policy favoring arbitration agreements."); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2nd Cir. 1985). Courts are to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Any doubt concerning waiver must be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25.

Thus, "[t]he burden on one seeking to prove a waiver of arbitration is a heavy one." *Sibley v. Tandy Corp.*, 543 F.2d 540, 542 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). In those rare instances in which waiver is found, the party guilty of waiver has generally engaged in some action (as opposed to taking no action) inconsistent with the right to arbitrate. *See, e.g., National Foundation for Cancer Research v. A.G. Edwards & Sons*, 821 F.2d 772, 774 (D.C. Cir. 1987). Here, however, the Eleventh Circuit has held that doing nothing, specifically not demanding arbitration in 1979, nearly six years before suit was filed in Alabama, as opposed to doing something inconsistent with the right to arbitrate can constitute waiver. In so holding it stands alone among the circuits.

Under the principles set forth by this Court, it is clear the Eleventh Circuit's conclusion that the Petitioner waived its contractual right to compel arbitration six years before this action was commenced is both unsound and in conflict with the decisions of other circuits.

B. The Eleventh Circuit Decision

The Eleventh Circuit grounded its finding that the Petitioner waived its contractual right to compel arbitration on nothing more than the Petitioner's failure to make a pre-litigation demand for arbitration against General Development in 1979 during the earlier Virginia litigation. The Petitioner was not a party to that litigation, which began in 1976, some nine years before the Alabama litigation was instigated. Nonetheless, the Eleventh Circuit concluded that "[i]n short, the appropriate time for [the Petitioner] to contest coverage and demand arbitration with General Development was during the proceedings in the United States District Court for the Eastern District of Virginia." (App. A, 19a). Then, based on nothing more, and without analysis, the court concluded that because the Petitioner "has waived its right to arbitrate with General Development, it has also waived its right to demand arbitration with [the Respondent]," whose claims

did not surface in the Southern District of Alabama until June 26, 1985. (App. A, 20a).

The Eleventh Circuit did not base its finding of waiver on any acts of the Petitioner *after* the Alabama litigation was commenced. When suit was filed Petitioner challenged the district court's subject matter jurisdiction and the Court dismissed Respondent's action on that ground. (App. G). When the Eleventh Circuit reversed the decision of the district court and thus held that the lower court did indeed have jurisdiction (App. F), Petitioner then moved to stay this suit under § 3 of the Act. A party who contests the court's jurisdiction, as Petitioner did here, does not waive its right to arbitrate. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l. Oil*, 767 F.2d 1140 (5th Cir. 1985). Thus, it is clear that we confront here a finding of waiver made by an appellate court (reversing the district court's findings) predicated solely on Petitioner's failure to demand arbitration against a person *other than the Respondent* during the pendency of a suit to which Petitioner was not a party.

The Eleventh Circuit's holding that the Petitioner waived its arbitration rights by failing to make a pre-litigation demand hardly puts arbitration agreements on "the same footing" with other agreements and, thus, violates the Act's basic tenet. *See Volt Info. Sciences*, 489 U.S. at 478. On the contrary, arbitration agreements are treated with judicial hostility by the Eleventh Circuit. Moreover, the ruling completely thwarts the federal policy which favors arbitration and resists a finding of waiver. As noted earlier, the Act's passage was intended "to place such agreements 'upon the same footing as other contracts.'" In passing the Act, Congress realized that it is an absolute necessity that parties entering into arbitration agreements have at least a reasonable measure of certainty that their agreements will be enforced by the courts. It follows then that these parties must know with reasonable certainty what actions on their part will deprive them of their contractually guaranteed arbitration rights.

Without question, the Eleventh Circuit's decision robs the parties to an arbitration agreement of the certainty that the Act was designed to provide and which is essential in international transactions. *See Scherk*, 417 U.S. at 511; *Vimar Seguros y Reaseguros, S.A.*, 115 S.Ct. at 2328. Moreover, its conclusion that a party can be deprived of its contractual right to arbitrate by failing to make a formal claim six years before the suit against it perpetuates the historical refusal of courts to put arbitration agreements on "the same footing" as other agreements. If this decision stands, parties to arbitration agreements who perceive that they might, one day in the future, even by chance, be summoned into a court of the Eleventh Circuit, will never know whether they should demand arbitration of any possible claims against them before a lawsuit on such claims is filed or whether they might wait and never have suits filed against them. If they do nothing and are later hailed into a court within the Eleventh Circuit, they may be deemed to have forever waived their right to arbitrate. On the other hand, if lucky enough to be sued elsewhere, their right to arbitrate will survive. This is not what Congress intended when it enacted the Act and is certainly in conflict with what other circuit courts have held. This Court has mandated that such uncertainty should not exist. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). If a vessel undertakes a voyage and must "traverse the waters of many jurisdictions," an intolerable uncertainty would (and in the Eleventh Circuit does) exist "if jurisdiction were left to any place where [a party] might happen to be found." *The Bremen*, 407 U.S. at 13. This Court in *The Bremen* required the enforcement of a forum-selection clause, noting that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause." *Id.* at 519.

C. The Conflict

In addition to its frontal assault upon the philosophical underpinnings of the Arbitration Act, the Eleventh Circuit's holding is in direct conflict with two decisions of

the Fifth Circuit, one of which is binding authority, and is in conflict with decisions of the Eighth Circuit and district court decisions within the Second and Eleventh Circuits which followed the rules previously laid down by the courts.

The most troubling conflict is with the Fifth Circuit's decision in *General Guaranty Ins., Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970). There, in deciding that a pre-litigation demand was not necessary for a party to preserve its right to arbitrate, the Fifth Circuit concluded that "[t]he Act is not limited by its terms to cases in which the party moving for a stay has made a pre-suit demand for arbitration." *Id.* at 928. As the court stated, "[t]o limit the Act to so narrow a range of cases would be inconsistent with the salutary Congressional purposes of furthering the intent of the parties and relieving the courts of burdens." *Id.* The Fifth Circuit also noted that further evidence of the non-existence of such a limitation was "indicated by the many cases in which there has been searching inquiry into *post*-suit behavior to determine if there has been default or waiver." *Id.* (emphasis added).

Finally, the Fifth Circuit noted the unfairness inherent in requiring a party to make a pre-litigation demand for arbitration under the threat of losing forever its contractual right to arbitrate. It correctly observed that requiring such a demand before suit is filed is tantamount to requiring a party to seek out and defend, indeed invite, claims against it which might not otherwise have been made or which are not meritorious. *Id.* The purpose of the Act is not to incite parties to barratry. Thus *General Guaranty* establishes the proposition that a party does *not* waive its contractual right to arbitration by failing to demand arbitration upon the occurrence of an incident which might give rise to litigation. Stated differently, a pre-litigation demand for arbitration is not a condition precedent to invoking the stay envisaged by § 3. *See Lubrizol Int'l. v. M/V STOLT ARGOBAY*, 562 F. Supp. 565, 573 (S.D.N.Y. 1982) (citing *General Guaranty* for

the holding that "arbitration [is] not waived by failure to file [a] pre-suit demand.").

In subsequent decisions, the Fifth Circuit has held steadfast to the proposition that "it is not necessary that the party moving for a stay of proceedings have made a pre-suit demand for arbitration." *Tenneco Resins, Inc. v. Davy Int'l. AG*, 770 F.2d 416, 419 (5th Cir. 1985). Although some courts have indicated that a party's failure to assert a pre-litigation demand for arbitration may be one factor contributing to a finding of prejudice, no court considering the issue has ever concluded that such a failure in and of itself constitutes waiver. *See, e.g., Stifel, Nicholaus & Co., Inc. v. Freeman*, 924 F.2d 157 (8th Cir. 1991). But the Eleventh Circuit so held in the decision we ask this Court to review.

Curiously, in arriving at its finding of waiver, the Eleventh Circuit never mentioned the binding decision in *General Guaranty*. Instead, with no real analysis of the issue before it, the Eleventh Circuit concluded that "[a]lthough the court in *Tenneco Resins* . . . noted that a party is not obligated to make a pre-suit demand for arbitration, we do not believe that an insurer should be permitted to collude with its insured to the detriment of the injured third-party." (App. A, 19a). But is this collusion anxiety a justification for requiring a pre-litigation demand for arbitration in order not to lose the right to arbitrate? If so, where is the evidence of collusion? None exists. Indeed, no one has suggested collusion. Why then did the court make such a statement? Perhaps for the same reason the court resolved the jurisdictional issue on a case decided eight months before enactment of § 16. Perhaps for the same reason it misstated the Congressional purpose behind the Arbitration Act.

Any question of collusion, we submit, is a separate issue which should have been determined by the district court only if expressly pleaded by the party seeking to avoid the arbitration agreement. Section 2 of the Act provides that an arbitration clause in a contract is "valid,

irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. Collusion of the type imagined by the Eleventh Circuit would certainly constitute a basis for revocation of the contract. Yet there was no claim of collusion and certainly no collusion has been found or suggested by the district court. Furthermore there has been no affirmative allegation of such misconduct under Rule 8(c), Fed. R. Civ. P., which requires that such defenses to a claim be set forth affirmatively. When this is done, the district court can inquire into such questions, as it did at length on the question of waiver.

In any event, the concerns about imagined but unproved collusion are premature. In *Vimar Seguros y Reaseguros*, the plaintiff claimed that Japan would not follow the dictates of the governing law. 115 S.Ct. at 2329. This Court observed that such a concern is premature because here "Respondents seek only to enforce the arbitration agreement." *Id.*

Nonetheless, based on nothing more than its assumption that there existed an opportunity for collusion in the years before this suit was commenced, the Eleventh Circuit ignored the federal policy favoring arbitration, ignored the strong presumption against a finding of waiver, and ignored binding and persuasive decisions from other circuits in order to advance the indefensible proposition that a party's failure to make a pre-litigation demand for arbitration can constitute an irretrievable loss of its contractual right to arbitrate. The extent of the uncertainty which the Eleventh Circuit has brought to this issue is demonstrated by the decisions of lower courts which have followed what seemed to be well-reasoned precedent. For instance, in *Southside Internist Group v. Janus Capital Corp.*, a case within the Eleventh Circuit's jurisdiction, the court noted that binding precedent made "clear that failure to file a pre-suit demand for arbitration is not a waiver." 741 F. Supp. 1536, 1539 (N.D. Ala. 1990). *See also Lubrizol*, 562 F. Supp. 565 (S.D.N.Y. 1982), (following the Fifth Circuit's decision in *General Guar-*

anty). In *Allied-Bruce Terminix Companies*, district court decisions were deemed relevant to determining the extent in conflicts in decisions of the courts of the various circuits. 115 S.Ct. at 837.

By requiring a pre-litigation demand for arbitration, the Eleventh Circuit has saddled a party with a duty to demand arbitration of potential claims against it and, in so doing, ignores the fact that (i) such claims may have never been prosecuted in either arbitration proceedings or litigation, and (ii) may in fact be claims without merit. Such a decision is in direct conflict with other circuit's decisions which recognize a party's legitimate interest in, and the judicial policy of, not inviting claims against it. This pre-litigation waiver requirement created by the Eleventh Circuit is yet another reason for this Court to review the Eleventh Circuit's decision of September 6, 1995.

III. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A FEDERAL DISTRICT COURT EXERCISING ADMIRALTY JURISDICTION MUST APPLY DIRECT ACTION STATUTES OF THE STATE IN WHICH THE COURT IS SITUATED WITHOUT REGARD TO FEDERAL ADMIRALTY CHOICE OF LAW RULES.

A. The Question

The Eleventh Circuit ruled in this case that a federal district court exercising admiralty jurisdiction is bound to apply the direct action statutes of the state in which it is situated as the procedure of the forum and, for that reason, must not conduct any federal choice of law analysis. This is in conflict with the law of the Fifth and Second Circuits. In *Fleming v. Pan American Fire & Casualty*, the Fifth Circuit Court of Appeals held that the applicability of the Alabama direct action statutes is to be determined under choice of law rules. 495 F.2d 535 (5th Cir. 1974). And, in *State Trading Corp. v. Assuranceforeningen Skuld*, the Second Circuit recognized that while state

direct action statutes may be properly applied in admiralty cases, they "must yield in . . . admiralty suit[s] to federal choice of law rules." 921 F.2d 409, 414. The significance of this circuit split lies in the fact that the Eleventh Circuits' holding compels district courts to ignore Supreme Court jurisprudence respecting admiralty conflict rules. *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571 (1953). Such a holding undermines the goals of uniformity and predictability in admiralty law. The Second Circuit has recognized the balkanizing effect of the result reached by the Eleventh Circuit and cautioned that applying direct action statutes "under a strained designation as procedural law" will create "substantial variation" in rights and duties merely "as a result of choice of forum that choice of law doctrine was designed to prevent." 921 F.2d at 416.

Furthermore, the Eleventh Circuit's conclusion that a federal district court is compelled to apply purported *procedural* provisions of the state in which the district court is situated is a perversion of this Court's rule in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

B. The Eleventh Circuit Decision

This Court should grant certiorari and resolve this conflict in accordance with the law of the Fifth and Second Circuits. Respondent initiated this action under an English direct action statute. However, on remand following the first appeal to the Eleventh Circuit, Respondent "abandoned his argument that the English bankruptcy statutes applied, and instead, relied solely on the Alabama direct action statutes." (App. A, 7a). The Eleventh Circuit recognized the conflict, *i.e.*, "whether the English bankruptcy statutes or the Alabama direct action statutes apply." (App. A, 11a). But it avoided the conflict by concluding that the Alabama direct action statutes apply automatically as the procedure of the forum. (App. A, 13a). According to the court, the Alabama direct action statutes are procedural and therefore not subject to any choice of law analysis in this admiralty action. *Id.* By this, the Eleventh Circuit is pre-

pared to compel the automatic application of the Alabama direct action statutes in this admiralty action brought by a *Virginia* resident, representing *foreign* seamen, to compel a *Luxembourg* marine underwriter to pay a judgment rendered in a *Virginia* court against a *Cypriot* corporation.

The fallacy in the Eleventh Circuit's ruling begins with the court's misconception of *Wilburn Boat Co. v. Fireman's Fund*, 348 U.S. 310 (1955). It correctly cites *Wilburn Boat* as establishing that "in the absence of a controlling federal admiralty principle, state law can be applied in an admiralty case." (App. A, 11a). In the context of this case, though, this settled principle is of no moment since, as the court itself notes, the conflict does not involve federal admiralty law, but rather a determination of whether English or Alabama law applies. *Id.* However, the Eleventh Circuit then incorrectly inferred from *Wilburn Boat* a license to indiscriminately apply Alabama law without regard to any choice of law analysis when, in fact, this Court in *Wilburn Boat* remanded with instructions to apply "appropriate" state law, thereby indicating that a conflict analysis is required. *Wilburn Boat*, 348 U.S. at 320-21.

Upon its misconception of *Wilburn Boat*, the Eleventh Circuit arrived at the conclusion that the Alabama direct action statutes are state procedural provisions which are applicable without regard to any choice of law analysis. (App. A, 11a-13a). However, the Alabama Supreme Court established that the Alabama direct action statutes are not procedural in *Macey v. Crum*, 30 So. 2d 666 (Ala. 1947). In *Macey*, the Alabama Supreme Court explained that the Alabama direct action statutes "are *more than procedural in character* and give the injured party a vested interest . . . ." *Id.* at 667 (emphasis added).

C. The Conflict

It is at this point in the Eleventh Circuit's opinion that the court misinterprets *Fleming v. Pan American Fire &*

Casualty, 495 F.2d 535 (5th Cir. 1974) and creates a split with the Fifth Circuit. The Eleventh Circuit's conclusion that Alabama's direct action statutes apply automatically and without regard to conflicts analysis is based on its flawed view of *Fleming* as a case in which Alabama's direct action statutes applied without regard to the place of contract formation or the residence of the contracting parties. (App. A, 13a). But the Fifth Circuit Court of Appeals' application of Alabama's direct action statutes in *Fleming* was *not* without regard to appropriate choice of law rules. Rather, the court in *Fleming* expressly recognized that the applicability of the Alabama direct action statutes was governed by Alabama's choice of law rules because the action was based on diversity jurisdiction and brought in Alabama. Relying on *Klaxon Co. v. Stentor Electric Mfg.*, 313 U.S. 487 (1941), in which this Court established that forum choice of law rules govern in diversity actions, the Fifth Circuit stated that "the applicability . . . of [the Alabama direct action statutes] must be determined in accordance with the law of Alabama." Thus, while it is true that the Alabama direct action statutes were applied in *Fleming* without regard to the place of contract formation or residence of the parties, the statutes were applied *only because* the applicable choice of law rules, those of Alabama under *Klaxon*, provided for that result, not because they were procedural provisions of the forum to be applied automatically. *Fleming*, then, establishes that the Alabama direct action statutes are subject to choice of law analysis. The Eleventh Circuit opinion now before this Court, then, is in conflict with the Fifth Circuit's holding in *Fleming*. Furthermore, since *Fleming* is binding on the Eleventh Circuit, this case places the Eleventh Circuit in conflict with its own precedent.

Significantly, Petitioner submits that the very premise that a federal district court sitting in admiralty (or diversity) must apply the *procedural* law of the state in which it is situated is defective. It is well settled that a district court exercising diversity jurisdiction must

apply the *substantive* law of the state in which it is situated (*Erie Railroad v. Tompkins*), including the choice of law rules of the forum state (*Klaxon Co. v. Sentor Electric Manufacturing Co.*, 313 U.S. 487 (1941)). And, as previously noted, district courts exercising admiralty jurisdiction over marine insurance matters are to apply *appropriate* state law in the absence of a controlling admiralty rule. (*Wilburn Boat*, 348 U.S. 310; *see also, Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1487 (11th Cir. 1986) (instructing that the application of a direct action statute under *Wilburn Boat* requires the district court to "identify the state law involved.")). But the Eleventh Circuit cites no authority for its inexplicable mandate that federal district courts in Alabama, and in Georgia and Florida, must apply *procedural* provisions of their respective forum states. This is a perversion of the *Erie* doctrine.

The Eleventh Circuit decision conflicts with the law of the Second Circuit. In *State Trading Corp. v. Assurance-foreningen Skuld*, 921 F.2d 409 (2d Cir. 1990), the Circuit Court of Appeals for the Second Circuit was presented with the very issue in question and flatly rejected the reasoning and rule of the Eleventh Circuit. The Second Circuit declared:

> To the extent the dictum in footnote five of *Morewitz* can be read to support the proposition that a federal court sitting in admiralty must apply a direct action statute as the procedural law of the forum state, without any choice of law analysis, *we decline to follow it*.

921 F.2d at 415 (emphasis added). Of course, the "dictum in footnote five" is now law in the Eleventh Circuit.

The plaintiff in *State Trading Corp.*, an Indian corporation, was the owner of a cargo that was lost in international waters upon the sinking of a vessel. The vessel was owned by a Panamanian corporation and was managed by a Belgian corporation. Skuld, a Norwegian insurance association was the vessel's insurer. The plaintiff obtained

an arbitration award against the vessel owner which award was confirmed by the District Court for the Southern District of New York. Since the owning company had been dissolved, the plaintiff filed suit against Skuld in the District Court for the District of Connecticut, attempting to gain the benefits of Connecticut's direct action statute.

The plaintiff's suit was dismissed by the court which affirmed a magistrate's ruling that "it is abundantly clear that . . . the *substantive* laws of the State of Connecticut, as expressed in [Connecticut's direct action statute], have absolutely no bearing on this litigation." *State Trading Corp.*, 921 F.2d at 411 (emphasis in original). The Second Circuit affirmed and held that the direct action statute was subject to federal choice of law rules. Relying on its decision in *Collins v. American Automobile Ins. Co.*, 230 F.2d 416 (2nd Cir. 1956), the court recognized that the direct action statute was a substantive provision "because it creates a right of action against a defendant where no such right previously existed." *State Trading Corp.*, 921 F.2d at 421-22. Here, the court cites with approval Judge Tjoflat's separate decision in the first *Morewitz* opinion (App. F, 44a) where he criticizes the Eleventh Circuit's conclusion that direct action statutes do not create substantive rights. *Id.* at 416. Thus, expressly disagreeing with the Eleventh Circuit, the Second Circuit Court of Appeals stated that the "direct statute must yield in this admiralty suit to federal choice of law rules." *Id.*

Certiorari should be granted to give effect to the admiralty choice of law jurisprudence of this Court, thereby avoiding the " 'substantial variation' in rights and duties as a result of choice of forum that choice of law doctrine was designed to prevent." *Id.*

CONCLUSION

The Eleventh Circuit decision has created significant conflicts among the circuits which must be resolved by this Court. Specifically, we submit that this Court should resolve whether appellate review can be had of an order favoring arbitration *before* the parties engage in arbitration especially in light of the language of § 16 of the Act which prohibits it. We ask the Court to resolve whether a failure to make a pre-litigation demand for arbitration can, by itself, constitute a waiver of one's contractually guaranteed right to arbitrate. And we ask the Court to resolve whether state direct action statutes apply in admiralty cases as the procedure of the forum without consideration of choice of law rules, especially when to do so is to re-write a contract between citizens of other nations in a matter not affecting the forum state.

We submit that a writ of certiorari should be granted to resolve these important questions of law.

Respectfully submitted,

JOSEPH M. ALLEN, JR.
JOHNSTONE, ADAMS, BAILEY,
GORDON & HARRIS, L.L.C.
Post Office Box 1988
Mobile, Alabama 36633
(334) 432-7682
Counsel of Record for Petitioner